

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:**

B-219828

**DATE:** December 5, 1985**MATTER OF:**

Edgewater Machine &amp; Fabricators, Inc.

**DIGEST:**

1. Where first articles are separately priced, a bid that is mathematically unbalanced in the extreme because it grossly overprices first articles should be rejected, even if low, since the bid suffers from the same defect as an advance payment. Award would provide funds to the contractor early in contract performance to which it is not entitled if payment is to be measured on the basis of value received.
2. In a negotiated procurement, conversations that take place during a preaward survey that relate to the capability of a prospective contractor are distinct from discussions conducted prior to best and final offers since the latter are concerned with the acceptability of a proposal and thus serve a different purpose from those held during a preaward survey.

Edgewater Machine & Fabricators, Inc., protests the award of a contract for missile shipping containers to Precision Machining, Inc., by the Department of the Army under request for proposals (RFP) No. DAAH01-85-R-0430. Edgewater contends that Precision's price, although low, was not reasonable because its price for units to be delivered for first article testing was so high as to result in a financial windfall for Precision. Edgewater further contends that the Army, after conducting discussions, improperly failed to give Edgewater the opportunity to submit a best and final offer.

The protest is sustained in part and denied in part.

The solicitation issued on April 19, 1985, required delivery of six first article units for government testing within 121 days after contract award and delivery of 7,439 productions units in the period from 304 to 608 days after contract award. The RFP contemplated a firm, fixed-price contract and notified offerors that an award would be made on the basis of price and might be made on the basis of initial offers without discussions. There was no warning against unbalanced pricing and, although options for additional units had to be priced, those prices were not to be included in the evaluations. The RFP incorporated a provision of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.232-16 (1984) which permits progress payments based on the contractor's costs. The RFP also authorized the contractor to acquire materials and to commence production prior to the first article approval in accordance with FAR, 48 C.F.R. § 52.209-4. Under this provision, the contracting officer may authorize such acquisitions and production when it is necessary for the contractor to meet the delivery schedule. With respect to the materials obtained and the production performed prior to first article approval, however, progress payments were specifically limited to 25 percent of the total contract value.

Of the 18 proposals received on June 6, the four lowest priced were rejected or withdrawn. Precision's price of \$2,989,139 was then the lowest and was composed of \$750,000 for the six first article units at \$125,000 each and \$2,239,139 for the 7,439 containers at \$301 each. Precision's total price without the first article units was \$2,983,039 for 7,439 containers at \$401 each, \$6,100 less than its bid with first articles. Edgewater's price of \$3,128,648.80 included the price of \$159,000 for the six first article units at \$26,500 each and was the second lowest offer. Its bid without first articles was \$2,781 less. After preaward surveys resulted in each firm being found to be responsible, a contract requiring the first article units was awarded to Precision on July 29. Edgewater's protest was received in our Office on August 7.

Although Edgewater concedes that Precision's total price was low and reasonable, it contends that the loading of the first article units with a price of \$750,000 resulted in the other items not carrying their share of the costs of the work and profit. Thus, Edgewater argues, Precision will receive a financial windfall by being paid all of its anticipated overhead costs and profit before completing the first production unit. According to

Edgewater, if Precision should be defaulted for any reason after being paid for the first article units, the government would find it impossible to acquire the production units for the remaining contract balance.

The issue of the front-end loading of first article units was also raised in Riverport Industries, Inc., B-216707, Apr. 1, 1985, 64 Comp. Gen. —, 85-1 CPD ¶ 364; aff'd upon reconsideration, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108. In that case, we noted the general rule that while a bid is mathematically unbalanced if any item does not carry its share of the cost of the work plus profit, it is materially unbalanced only if there is a reasonable doubt that award would result in the lowest ultimate cost to the government. We then held that even if a bid offers the lowest price to the government but is grossly unbalanced mathematically, it should be viewed as materially unbalanced since acceptance of the bid would result in the same evils as an advance payment. An advance payment occurs when a payment under a contract to provide a service or deliver an article is more than the value of the service already provided or the article already delivered. An advance payment is prohibited by 31 U.S.C. § 3324(a) (1982) (formerly 31 U.S.C. § 529), except as otherwise provided by law. Upon reconsideration, we emphasized that the decision will apply only where the bidding scheme, viewed as a whole, is grossly unbalanced mathematically.

We think this case falls squarely within the Riverport rule. We reach this conclusion because it is apparent that the actual value of the first articles, as determined from the face of the bids, nowhere approaches the amount bid by either Precision or Edgewater. For example, if we can reasonably assume that a competitive environment will force bidders to offer prices that are reasonable in that these prices reflect a bidder's best judgment as to the amount required to win the contract award at a price that will afford it a fair and reasonable return, Precision's bid strongly suggests that it valued the first articles at about \$6100 (the difference in its total bid with and without first articles). Similarly, the value of the Edgewater first article would appear to be about \$2800.

We recognize that these calculations do not take into account the variables a bidder might use in allocating certain costs to various line items in a solicitation. Nevertheless, we have to assume that intelligent bidders will allocate their costs in such a way as to reasonably associate actual cost plus profit with the selling prices they hope to obtain. Contracts based on bids such as

Precision's, that are egregiously front-end loaded, provide the contractor with funds to which it is simply not entitled if payment is to be measured on the basis of value received. While we recognize that Precision's bid remains low even if the cost of the excess payment (interest) is considered, such a contract award, in our opinion, also provides an economic disincentive for the government to administer the contract in a manner consistent with its best interest if contingencies should arise after the first article has been accepted and paid for that would ordinarily require termination. Such economic concerns may well compromise the government's actions and thus creates an undesirable financial risk.

As indicated earlier, Edgewater's bid suffers from the same defect, albeit to a lesser degree. For that reason, it would be inconsistent to recommend termination of the Precision contract and award to Edgewater. We note also that the Riverport case was not formally resolved until after proposals were received in this case. Finally, we point out that neither the solicitation in Riverport nor the solicitation in this case contained a proscription against unbalanced bidding, such a clause being reserved for use in solicitations containing options. Federal Acquisition Regulations (FAR), 48 C.F.R. § 52.217-5 (1984).

Thus, while we remain of the opinion that an extremely front-loaded bid suffers from the same evil as an advance payment and that it is merely a device to obtain unauthorized contract financing, we will not recommend termination of this contract. Nonetheless, we are concerned about a bidding approach that suggests the first article price bears no reasonable relationship to the costs associated with it. By separate letter, we are advising the Secretary of the Army of our belief that steps should be taken to discourage this type of front-loading.

Edgewater further contends that because a proposal cannot be deemed acceptable without assurance that the prospective contractor is capable, the agency conducted "discussions" within the meaning of FAR, 48 C.F.R. §§ 15.610 and 15.611, when it made the preaward survey. The agency argues that since there has been no showing that the survey sought information relating to the acceptability of Edgewater's proposal or that Edgewater was permitted to revise its proposal, there has been no showing that discussions took place.

Although we recognize that a successful negotiated procurement requires both an acceptable proposal and a capable contractor, we find no substance to Edgewater's argument that the determination of the acceptability of the proposal and the capability of the prospective contractor are inextricably intertwined. The FAR, at 48 C.F.R. §§ 15.610 and 15.611, clearly relates to the discussions necessary to determine the acceptability of a proposal and the best and final offers that must follow such discussions. FAR, 48 C.F.R. § 9.100, clearly indicates that the purpose of a preaward survey is to evaluate the capability of the prospective contractor to perform the contract. See Saxon Corp., B-216148, Jan. 23, 1985, 85-1 CPD ¶ 87. Thus, the determinations as to the acceptability of a proposal and the capability of an offeror involve distinct functions for different purposes usually performed at different times by different people. Moreover, the record here demonstrates that the survey team did not step outside the bounds of its responsibility evaluation. This is illustrated by Edgewater's statement that the survey included:

" . . . a physical survey of the manufacturing facilities, its equipment, the quality control program, what subcontracting programs were envisaged, inquiries as to quotations from seller of long lead items and all of the other matter which go into a sound manufacturing operation. Before and after the the actual day of this visit of the pre-award survey team, [Edgewater] had been supplying financial data to DCAAS in Orlando as a part of the pre-award survey."

These are all appropriate matters on which to base a responsibility determination and are consistent with the requirements of FAR, 48 C.F.R. § 9.104, that set forth the general and special standards to be applied by the survey team in its evaluations.

The protest is sustained in part and denied in part.

*Harry R. Van Cleve*

Harry R. Van Cleve  
General Counsel